(25)

No. 03-1454

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ANGEL MCCLARY RAICH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents manufacture, distribution, and possession of marijuana involve a fungible commodity that is regularly bought and sold in an interstate market. That market, like the market for numerous other drugs having a significant potential for abuse and dependence, is comprehensively regulated by the Controlled Substances Act (CSA). U.S. Br. 17-20. Schedule I drugs like marijuana, heroin, and LSD have been found to have "no currently accepted medical use in treatment in the United States." 21 U.S.C. 812(b)(1)(B). In order to eradicate the market for such drugs, the CSA makes it unlawful to manufacture, distribute, dispense, or possess *any* Schedule I drug for *any* purpose, medical or otherwise, except as part of a strictly controlled research project. 21 U.S.C. 823, 841, 844; U.S. Br. 2-3.

Respondents do not challenge the constitutionality of the CSA on its face or, apparently, in most of its applications. Nor do they challenge the status of marijuana as a controlled substance under the CSA or its placement in Schedule I. They nevertheless contend that their own drug-related

activities are beyond the reach of Congress's power under the Commerce Clause. While respondents purport to make only a narrow "as applied" challenge to the CSA, the arguments they advance are not readily cabined. And those arguments are, in any event, without merit.

Respondents contend that their production (i.e., cultivation), distribution, and resulting possession of marijuana are beyond the reach of the Commerce Clause because they engage in that conduct for a medical purpose, based on the recommendation or advice of a physician, consistent with state law. There is, however, no basis in the Commerce Clause for respondents' attempt to distinguish the production, distribution, and possession of marijuana for medical rather than recreational purposes. Under the CSA, moreover, the possible medical use of a controlled substance and the recommendation of a physician (in the form of a prescription) are relevant—indeed central—to how that substance is regulated, but not to *whether* it is regulated. The CSA regulates potentially addictive drugs, whether or not they have medical uses. U.S. Br. 39-43. It therefore would be fundamentally inconsistent with the very premises and regulatory framework of the CSA to exempt respondents from that Act because they assert a medical purpose for their drug activities.

Respondents' argument, moreover, is not logically confined to marijuana. It extends to heroin, LSD, or other Schedule I substances, and would appear to allow them to engage in similar intrastate manufacture, distribution, and possession of drugs on Schedules II through V for "personal medical purposes," without complying with the strict controls the CSA imposes for medical uses.

Nor is it relevant that respondents' conduct may be lawful under state law. Under the Supremacy Clause, state law cannot insulate conduct from the exercise of Congress's enumerated powers. And here, regulation of intrastate ac-

tivities is an essential part of Congress's regulation of the interstate drug market and Congress's goal of achieving a comprehensive and uniform system that guards against drug abuse and diversion and permits manufacturing and distribution for legitimate medical uses only under carefully prescribed safeguards in the CSA itself. U.S. Br. 22-28, 32-35. Absent authority to apply the CSA to local drug activities, the federal government would face enormous impediments to enforcing the CSA's prohibition against drug trafficking and diversion. Illicit drugs such as marijuana are fungible and unlabeled and often provide no clue as to their origin, intended use, or whether they were involved in a cash sale. *Id.* at 28-32.

A. The Drug Activities At Issue Substantially Affect Interstate Commerce

1. Respondents assert that their specific drug-related conduct—the manufacture, distribution, and resulting possession of marijuana for purported medicinal reasons—is intrastate, non-commercial, and "minuscule" in effect, and therefore is wholly beyond the power of Congress to regulate under the Commerce Clause. Br. 16-17, 20, 23-27. Those arguments ignore several fundamental tenets of this Court's jurisprudence.

It has long been established that Congress's power under the Commerce Clause and the Necessary and Proper Clause "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *United States* v. *Darby*, 312 U.S. 100, 118 (1941). That power encompasses regulation of the inherently economic activity of producing and distributing a valuable commodity that is sold in an interstate market, see, *e.g.*, *Wickard*

v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Lopez*, 514 U.S. 549, 560 (1995), as well as possession of the commodity that necessarily results from such production or distribution.

Where "Congress itself has said that a particular activity affects the commerce, * * * the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." *Darby*, 312 U.S. at 120-121. If "that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968)). See *Lopez*, 514 U.S. at 558 (quoted p. 11, *infra*); *id.* at 600 (Thomas, J., concurring).

A court may not avoid this fundamental principle by subdividing the class of activities that Congress defined and focusing narrowly on one subclass that is alleged to have an insufficient nexus to interstate commerce. As long as the class as defined by Congress bears a rational relationship to its regulation of interstate commerce, the statute is constitutional.

In *Wirtz*, *supra*, for example, the Court explained that "*Darby* itself recognized the power of Congress * * * to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is 'within the reach of the federal power.' The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a *rationally defined class* of activities has been put entirely to rest." 392 U.S. at 192-193 (quoting *Darby*, 312 U.S. at 120-121) (emphasis added). See *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964) (sufficient that legislators "have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce"). Thus, as the Court explained in *Lopez*, the relevant inquiry under its precedents is "whether a rational basis existed for concluding that a regulated

activity sufficiently affected interstate commerce." 514 U.S. at 557.[1]

As explained below and in our opening brief, Congress plainly had a rational basis for including all controlled substances as a class within the statutory scheme and for comprehensively regulating the manufacture, distribution, and resulting possession of such substances, including marijuana, whether those activities occur interstate or intrastate and whether they are pursued for medical or other purposes. Indeed, with the exception of the Ninth Circuit in this case, the courts of appeals that have considered the question have sustained the application of the CSA to similar conduct by concluding that the class of activities is within the reach of Congress's power under the Commerce Clause. See *Proyect* v. *United States*, 101 F.3d 11, 13 (2d Cir. 1996); *United States* v. *Genao*, 79 F.3d 1333, 1336 (2d Cir. 1996); *United States* v. *Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995); *United States* v. Scales, 464 F.2d 371, 375-376 (6th Cir. 1972); *United States* v. *Lopez*, 459 F.2d 949, 953 (5th Cir.), cert. denied, 409 U.S. 878 (1972).

2. Respondents' submission is also directly contradicted by *Wickard*, *supra*, which upheld congressional regulation of homegrown wheat even though that activity "may not be regarded as commerce," 317 U.S. at 125, and the wheat was not "sold or intended to be sold," *id.* at 119. The Court reached that result because the production of the wheat was nonetheless economic activity occurring in a regulated market. *Id.* at 128; accord *Lopez*, 514 U.S. at 560-561; U.S. Br. 16.

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[1] Respondents cannot evade this settled precedent simply by emphasizing that their challenge is to the CSA "as applied." The challenges in cases such as *Perez*, *Wirtz*, and *Wickard* were also "as applied" challenges, and were rejected by employing an analysis that focused on the class of activities and not the individual plaintiff's conduct.

Respondents attempt to limit *Wickard* to its specific facts. Br. 13-18. In every relevant respect, however, the cases cannot be distinguished. Like the wheat in *Wickard*, marijuana that is grown, distributed, and then possessed for personal "medical" consumption can also, at any step, be sold or distributed to others. Similarly, marijuana sought for "medical" consumption can be either bought or grown, and access to and prevailing conditions in the market will influence both consumption and the means of acquisition of the product. Given the fungibility of marijuana and similar products, Congress found that federal regulation of all marijuana, no matter what its asserted origin or destination, is necessary. 21 U.S.C. 801(5). As in *Wickard*, there is no basis for overriding that congressional determination. See 317 U.S. at 125 ("even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"). Indeed, given Congress's goal of entirely eliminating the interstate market in Schedule I substances—as opposed to regulating a commodity's price, as in *Wickard*—the threat that unregulated local activity poses to a legitimate federal regulatory scheme is even greater here.

Respondents' efforts to distinguish *Wickard* are unavailing. Respondents assert (Br. 14-16) that the amount of wheat that Filburn produced for consumption on his farm was significant by comparison to the amount of marijuana cultivated in this case. That is no basis for distinguishing *Wickard*. This Court rejected Filburn's challenge even though it expressly assumed that Filburn's contribution to the demand for wheat "may be trivial by itself." 317 U.S. at 127. Moreover, for farmers covered by the Agricultural Adjustment Act (AAA), any production in excess of an allotment was regarded as "available for marketing" and subject to penalty. *Id.* at 119. And in light of Congress's goal of

eliminating interstate commerce in Schedule I substances, rather than merely regulating the prevailing price in that market, even relatively small amounts of "lawful" Schedule I substances could cripple the federal scheme, especially given the fungible nature of marijuana.

Respondents also urge (Br. 15) that "[s]imple arithmetic" confirms that most of Filburn's excess production was used to feed livestock on his farm rather than to bake bread for his family, and note that the farm itself was a commercial operation. This Court, however, decided the case on the premise that the "intended disposition of the crop here involved has not been expressly stated." 317 U.S. at 114. The intended disposition—feed versus bread—was not relevant to either this Court's holding or to the purpose of the AAA, which was designed to stabilize the price of wheat by regulating the amount available to be sold. Finally, respondents observe (Br. 14) that the quota system established by the AAA did not apply to farms on which the acreage planted to wheat did not exceed 15 acres. But that point was not discussed in the Court's Commerce Clause analysis and appears only in the Due Process ruling. See 317 U.S. at 130 & n.30.[2]

Respondents suggest in passing (Br. 13), supported by some of their amici (Institute for Justice Am. Br. 14-30; Alabama et al. Am. Br. 24-25), that *Wickard* and its progeny should be overruled. As this Court explained in *Lopez*,

[2] Contrary to respondents' suggestion (Br. 19), *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta* v. *United States*, 379 U.S. 241 (1964), do not support analyzing the effects on interstate commerce from respondents' activities as separate and apart from the overall scheme regulated under the CSA. Congress had determined that the provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, would apply only to certain sub-categories of restaurants and motels, and the Court therefore considered the constitutionality of Title II as so drawn. *Heart of Atlanta*, 379 U.S. at 247-249; *McClung*, 379 U.S. at 298-299.

however, the "doctrinal change" ushered in by *Darby*, *Wickard* and similar decisions of that era reflected both "a recognition of the great changes that had occurred in the way business was carried on in this country," as well as "a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce." 514 U.S. at 556; *id.* at 568-574 (Kennedy, J., concurring). "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of [the Court's] Commerce Clause jurisprudence as it has evolved to this point." *Id.* at 574. Congress has relied on that jurisprudence in enacting laws such as the CSA, which has been in place for more than 30 years, and respondents identify no fundamental flaw in this Court's governing precedents.

3. Respondents' contention that their drug activities are beyond the reach of Congress's power under the Commerce and Necessary and Proper Clauses because they are "non-commercial" and separable from the overall commercial drug market would create a gaping hole in the CSA. It would render Congress impotent to apply the CSA to any "non-commercial" drug activity, including that undertaken for recreational purposes or to satisfy a drug dependence, regardless of whether the drug is a Schedule I substance such as marijuana, LSD, or heroin, or a Schedule II-V substance such as methamphetamine, morphine, or cocaine. The inherently economic nature of respondents' underlying conduct—drug manufacturing, distribution, and ensuing possession—does not depend on the type of drug involved, the ultimate purpose of the activity, or the overt furnishing of consideration. Such conduct is subject to regulation under the Commerce Clause because it substantially affects the interstate market for controlled substances.

That conclusion is amply supported by the congressional findings in the CSA. Congress found that local drug activity,

including manufacture, distribution, and possession, substantially affects interstate commerce because such activity swells market demand and supply, because controlled substances readily cross state lines in market transactions, and because illicit drugs cannot be differentiated with respect to their origin and intended destination. 21 U.S.C. 801(3)-(5). Respondents complain that those findings are not marijuana-specific. But those conclusions hold true regardless of the type of drugs involved or the use to which they are put. Moreover, Congress was specifically aware when it enacted the CSA that "[t]he extent to which marihuana should be controlled is a subject upon which opinions diverge widely," and that "[t]here are some who not only advocate its legalization but would encourage its use." H.R. Rep. No. 1444, 91st Cong., 2d Sess., Pt. 1, at 12 (1970). Congress nonetheless listed marijuana "under schedule I, as subject to the most stringent controls under the bill." *Id.* at 13. And Congress found that federal control over all intrastate drug activity for controlled substances, including marijuana, was "essential to the effective control" of interstate drug activity. 21 U.S.C. 801(6).

Respondents also fault Congress for not making particularized findings with respect to marijuana intended for purported medical use in accordance with state law. But Congress can hardly be faulted for failing to anticipate and address subsequently-enacted state laws passed in the face of (1) federal prohibitions against marijuana production, distribution, and possession and (2) the underlying congressional determination, still in effect, that there is no currently accepted medical use for marijuana in the United States. Such subsequently enacted state laws cannot give rise to new limits on federal authority. In any event, Congress was not silent in the face of state laws like California's. It responded with a statutory provision entitled "NOT LEGALIZING MARIJUANA FOR MEDICINAL USE,"

in which Congress "oppose[d] efforts to circumvent" the Food and Drug Administration (FDA) approval process "by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the [FDA]." Pub. L. No. 105-277, Div. F, 112 Stat. 2681-760 to 2681-761. Congress thus has specifically determined that the reasons for comprehensively regulating controlled substances under the CSA continue to apply with full force to marijuana intended for medical use, even when authorized by state law.

For these reasons, it is completely irrelevant that it is "uncontroverted" that respondents in this case are not engaged in commerce. Resp. Br. 38. Whatever the true nature of respondents' own activities, the difficulty of "controverting" claims that the drugs in any particular case were produced wholly intrastate, for non-monetary exchange, or for personal medical use, vividly illustrates why Congress enacted a comprehensive regulatory system for such drugs. See 21 U.S.C. 801(5). Moreover, the record affirmatively shows that respondents' home-grown drug activities cannot be divorced from the overall drug market regulated by Congress. Both respondents Raich and Monson were consumers of lawful drugs listed on Schedules II through V, before turning to marijuana, a Schedule I substance, U.S. Br. 27, and respondents' claims of medical necessity suggest that both would purchase marijuana illegally if necessary. See J.A. 59. Raich also admits to past marijuana purchases. U.S. Br. 27-38. Each of these facts confirms what Congress found: that activities such as respondents' displace market transactions and threaten to swell the illicit drug market.

4. Recognition of the validity of the CSA as applied to respondents' drug activities does not, as respondents contend, confer on Congress "a general police power" or permit Congress to regulate a "homeowner planting and tending roses in his or her backyard." Br. 20, 26; see Constitutional

Law Scholars Am. Br. 13-14, 21. Rather, respondents' activities comfortably fall within Congress's commerce power because the activities occur in or are closely related to the comprehensively regulated drug market.

Moreover, Congress rationally included such activities within the CSA's regulatory scheme in order to suppress supply and demand and, particularly with respect to Schedule I substances, to enforce the CSA's prohibition on interstate commerce in such substances by banning production, distribution, and possession by the ultimate user. U.S. Br. 22-32. Congress could, of course, subject other substances —even hallucinogenic roses—to similar restrictions to enforce a ban on interstate commerce in the commodity. Such bans are rare, however, presumably because the circumstances calling for them are rare and because such comprehensive bans are particularly susceptible to political checks. But in certain circumstances, where concerns about fungibility require a ban on production, distribution, and possession in order to effectuate a ban on interstate trafficking in contraband, Congress may judge such action necessary. Congress's judgment here was clearly rational. The CSA as a whole and as applied to respondents' activities is simply a "*general regulatory statute*" that "*bears a substantial relation to commerce*," and accordingly "the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (quoting *Wirtz*, 392 U.S. at 197 n.27); U.S. Br. 14-15.

Likewise, upholding the CSA as applied to respondents' activities does not undermine the Court's holdings in *Lopez* and *United States* v. *Morrison*, 529 U.S. 598 (2000). See Resp. Br. 19-23. In those cases, the Court was concerned about the attenuated relationship between the conduct at issue—possession of a gun near a school (*Lopez*) and violence against women (*Morrison*)—and interstate commerce. But there is nothing attenuated about the connection between a

ban on manufacturing, distribution, and possession of contraband and a ban on trafficking in that valuable commodity in commerce. Respondents' activities, like those in *Wickard*, "involve[] economic activity in a way that the possession of a gun in aschool zone does not." *Lopez*, 514 U.S. at 560. Accordingly, and unlike in *Lopez* and *Morrison*, federal regulation of those activities is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. For that precise reason, both of the lower courts, in striking the statutes at issue in *Lopez* and *Morrison*, explicitly distinguished those statutes from the CSA's prohibitions against home-grown production and local possession of marijuana. *Brzonkala* v. *Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 836 n.7 (4th Cir. 1999) (en banc), aff'd *sub nom. United States* v. *Morrison*, 529 U.S. 598 (2000); *United States* v. *Lopez*, 2 F.3d 1342, 1367 n.51 (5th Cir. 1993), aff'd 514 U.S. 549 (1995); U.S. Br. 21-22.

B. Congress May Constitutionally Regulate Respondents' Marijuana Activities Notwithstanding State Law

1. Relying on principles of federalism, respondents assert that the CSA should not be interpreted to prohibit conduct, such as respondents' drug activities, to the extent that it is authorized under State law. Br. 42-45. That argument, raised for the first time in respondents' brief on the merits, is baseless. Absent a "plain indication to the contrary," it is presumed that Congress "is not making the application of the federal act dependent on state law." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (emphasis added); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983).

Nothing in the CSA overcomes that presumption. To the contrary, under the CSA, unlike in *Parker* v. *Brown*, 317

U.S. 341 (1943), and its progeny under the antitrust laws, on which respondents rely, Congress has subjected the private conduct at issue to a comprehensive regulatory regime administered by the Attorney General and imposed a closed system of distribution pursuant to federal law. That regime leaves no room for contrary state policies. See 21 U.S.C. 903 (preempting all state laws that pose a "positive conflict" with the CSA such that the state and federal law "cannot consistently stand together").

The CSA makes it a felony "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," "[e]xcept as authorized" by the CSA itself. 21 U.S.C. 841(a)(1). Respondents argue that the Doe respondents do not "distribute" marijuana but rather "dispense" it as authorized by California law. Br. 7 n.6. That distinction is irrelevant and mistaken. Both distribution and dispensation of marijuana are felonies unless the conduct complies with the CSA, 21 U.S.C. 841(a)(1), and the Doe respondents do not claim that they complied with the CSA. In any event, the CSA defines "dispense" as the delivery of any drug "pursuant to [a practitioner's] *lawful order*," 21 U.S.C. 802(10), and as this Court made clear in *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-491 (2001), there is no such thing under the CSA as a lawful order for a person to receive a Schedule I substance outside the narrow confines of government authorized research. See 21 U.S.C. 823(f), 829, 841(a)(1).

Similarly, the simple possession of marijuana by all respondents is prohibited by the plain terms of 21 U.S.C. 844(a), which authorizes possession of a controlled substance only when it is obtained under a "valid" prescription order. The Act clearly refers to prescriptions and orders that are valid under the CSA. Such prescriptions can be issued only for drugs on Schedules II through V, 21 U.S.C. 829, and only in compliance with the specific requirements of the Act.

Moreover, nothing in California law purports to make the possession of marijuana lawful under federal law. Any such effort would be the plainest of Supremacy Clause violations, and there is no justification for giving state law such an effect under the guise of statutory interpretation. State law simply removes state criminal prohibitions against cultivation and possession of marijuana, and leaves federal law, and Congress's authority, untouched.

2. Respondents and their amici also contend that principles of federalism prevent Congress from invoking its Commerce Clause power to apply the CSA in a way that interferes with a State's exercise of its police power. Resp. Br. 39-42; Cal. Nurses Ass'n et al. Am. Br. 3-4, 17-18. That radical proposition, however, would invert the operation of the Supremacy Clause, significantly impair Congress's power under the Commerce Clause, and obstruct effectuation of the CSA whenever a State made a contrary policy choice about the extent to which a drug has medical utility or potential for abuse. Not surprisingly, it is well settled that the commerce power "can neither be enlarged nor diminished by the exercise or non-exercise of state power." *Darby*, 312 U.S. at 114; *Wirtz*, 392 U.S. at 196-197.

3. Respondents argue that penalties under California law for commercial or recreational activities involving marijuana would serve to mitigate the adverse consequences of holding that Congress may not apply the CSA to respondents' activities. Br. 21, 29-30 n.16, 34, 36-37; accord Reason Found. Am. Br. 5-23; Inst. for Justice Am. Br. 10; Alabama et al. Am. Br. 3-6, 25-30. But the fact that California imposes penalties on the sale of marijuana and its cultivation or possession for recreational purposes, see Cal. Health & Safety Code §§ 11357, 11358, 11360(a) (West 2004), does nothing to facilitate the effectiveness of the CSA's penalties for "simple possession," see 21 U.S.C. 844, in order to eradicate the market in illicit drugs. As our opening brief explained, those

federal penalties are crucial both in suppressing the demand for marijuana and other Schedule I drugs and in decreasing the supply of drugs that can be sold. U.S. Br. 24-26, 27-28. Such penalties also make enforcement of the ban on interstate commerce in such substances effective. If, as respondents urge, a possession or distribution charge could be defeated by an unrebutted claim that the marijuana was intended for personal "medical" use in compliance with state law, the government would have to rebut that claim in the context of a fungible commodity that, in light of its illicit nature, would not have any of the markings that lawful drugs are required to bear to indicate their proper manufacture, distribution, or dispensing (see 21 U.S.C. 352, 825).

Furthermore, while California law prohibits the sale of marijuana, it does not prohibit the purchase. See *People* v. *Peron*, 70 Cal. Rptr. 2d 20, 27 (Ct. App. 1998). As a result, a person who possesses marijuana for his own personal medical use would not be subject to prosecution even if he had purchased the marijuana from someone else. See, *e.g.*, *People* v. *Wright*, 18 Cal. Rptr. 3d 220, 222, 227 (Ct. App. 2004) (also recognizing defense to charge of unlawful transportation of marijuana). For the same reason, primary caregivers such as the Doe respondents presumably would not be subject to prosecution if they purchased marijuana to supply to someone else for personal medical use. And, significantly, a California Court of Appeal has held that caregivers may receive "bona fide reimbursement for their actual expense" in "cultivat[ing] or acquir[ing] the medicinal marijuana." *Peron*, 70 Cal. Rptr. 2d at 31. Thus, it is clear that there is a fundamental mismatch between what state law permits (which includes, for example, possession as a result of a commercial exchange) and conduct that respondents contend lies beyond the bounds of Congress's Commerce Clause authority.

The dramatic effects on marijuana commerce of exempting drug activity authorized by California law well illustrate how such a rule would significantly undermine the enforcement and effectiveness of the CSA. The California chapter of one of respondents' amici "estimates that there are now more than 100,000 legal Prop. 215 patients in California." *California Dispensaries Proliferate in California*, Cal. NORML Newsletter, Aug. 1, 2004 <http//www.canorml.org/news/dispensariesproliferate.html>. That is the number under a legal regime in which federal law criminalizes such activity.[3] Were this Court to affirm the decision below, there would be no criminal prohibition against the manufacture, distribution, or possession of marijuana by the 35 million residents of California as long as they have a "written or oral recommendation or approval" of a physician that "marijuana provides relief" for "any * * * illness." Cal. Health & Safety Code § 11362.5(b)(1)(A) and (d) (West 2004); *Wright*, 18 Cal. Rptr. 3d at 226 ("[T]he defendant need not prove he is seriously ill to invoke the [Compassionate Use Act]."); see U.S. Census Bureau, *California Quick Facts* (visited Nov. 16, 2004) <http//quickfacts.census.gov/qfd/states/06000.html>; see also *Measure 33 is Wrong Prescription on Marijuana*, Statesman Journal, Sept. 27, 2004, at 5C

[3] Respondents observe that the federal government rarely prosecutes individuals for simple possession of small amounts of marijuana. Br. 31-32. That fact, however, does not prove that such possession is not occurring as part of commercial transactions, that such possession does not have substantial effects on the marijuana market as a whole, or that the advent of legal (i.e., non-contraband) marijuana would not frustrate the prosecution of the manufacturing, distribution, and possession cases the federal government does bring. It simply shows that the government exercises prosecutorial discretion in seeking to impose criminal penalties (as opposed to the type of civil forfeiture that occurred here), and that the government relies on the existence of the criminal prohibitions in the CSA to serve as a strong deterrent to illegal activity.

("About 10,000 Oregonians now use marijuana with a doctor's prescription.").

Marijuana collectives pose even greater threats to the federal scheme. Marijuana "cultivation collectives or cooperatives" are currently proliferating in California under the apparent assumption that they are legal under state law as long as the marijuana is not sold outright. *California Dispensaries Proliferate in California, supra.* For example, in *County of Santa Cruz* v. *Ashcroft*, 314 F. Supp. 2d 1000, 1007 (N.D. Cal. 2004), appeal docketed, No. 04-16291 (9th Cir. June 25, 2004), a district court held that the Ninth Circuit's decision in the instant case barred enforcement of the CSA against a cooperative of 250 members who manufactured and distributed marijuana because the cooperative did not charge its members for the marijuana but simply collected voluntary contributions.

The government's enforcement efforts would also be significantly hampered by the fact that there are no production, quality, or dose standards that could be relied upon to demonstrate that an amount of marijuana exceeds quantities appropriate for asserted medical purposes. U.S. Br. 30-31. For instance, in *Wright*, 18 Cal. Rptr. 3d at 226, a state court overturned a conviction of a person who possessed in his vehicle over a pound of marijuana packaged in six bags along with a scale. The court reasoned that the jury was entitled to believe the defendant's claim that "he needs relatively large quantities of the drug because he prefers to eat, rather than smoke," marijuana to alleviate physical pain and emotional stress. *Ibid.* See also *United States* v. *Alden*, Nos. 02-10673 & 02-10674 (9th Cir. Mar. 30, 2004), slip op. 2 (ordering release of defendant appealing marijuana convictions arising out of his manufacture of more than 1500 marijuana plants because "it is asserted that the drug involved is marijuana, the use is for medicinal purposes, and the use is strictly local").

Moreover, whatever the outer bounds of lawful possession in the State, California law clearly authorizes patients and primary caregivers to possess in excess of eight ounces of dried marijuana per patient and six mature or 12 immature plants per patient as long as the quantity is permitted by the city or county or the quantity is "consistent with the patient's needs." Cal. Health & Safety Code § 11362.77(a), (b) and (c) (West 2004); cf. 86 Ops. Cal. Att'y Gen. 180 (2003) ("Proposition 215 was approved by the voters without specificity as to the strength, quality, or quantity of marijuana to be used for medical purposes.") (emphasis added). The relevant policy in the cities of Oakland and Santa Cruz and the counties of Sonoma and Tehama is to allow patients to possess up to three pounds of processed marijuana. *Proposition 215 Enforcement Guidelines* (visited Nov. 9, 2004) <http://www.canorml.org/prop/local215policies.html>. Those amounts are astonishingly large, as three pounds of marijuana yields approximately 2700 joints or cigarettes. DEA, U.S. Dep't of Justice, *DEA Agents Manual* App. E (2004). The regime contemplated by respondents therefore would render it exceedingly unlikely that the federal government would be able to enforce the CSA as to persons manufacturing, distributing, or possessing even large quantities of marijuana without firm proof of a commercial transaction or purpose, despite Congress's specific finding that controlled substances typically have or will enter the stream of commerce. 21 U.S.C. 801(3); U.S. Br. 31-32.

It thus is highly implausible that existing state-law prohibitions against commercial or recreational marijuana activities would protect the regulatory scheme as envisioned by Congress. California law rests on fundamentally different assumptions about the risks and benefits of marijuana. Moreover, California law imposes none of the stringent production, order form, prescription, record-keeping, labeling, packaging, and diversion controls that the CSA places on

controlled substances that (unlike marijuana) Congress has deemed to have an accepted and legitimate medical use. 21 U.S.C. 821-829. The regime urged by respondents and embraced by the Ninth Circuit's decision would therefore completely undermine the CSA's comprehensive, uniform, and closed system of regulation that is intended to protect both interstate commerce and the public health and safety, and would have a staggering effect on the interstate marijuana market and congressional control over that market.

C. The Preliminary Injunction Cannot Be Affirmed on Alternative Grounds.

Respondents assert that the decision below may be affirmed on the alternative basis of a supposed "non-constitutional doctrine of medical necessity," Br. 46, as well as on Fifth Amendment grounds, Br. 48-50. The district court rejected those contentions, Pet. App. 58a-65a, but the court of appeals did not address them, *id.* at 9a. This Court, therefore, should not reach them either. See, *e.g.*, *Oakland Cannabis*, 532 U.S. at 494.

Respondents' arguments are, in any event, without merit. This Court in Oakland Cannabis specifically rejected not only a medical necessity defense but also any distinction between a claimed medical necessity to manufacture and distribute marijuana and a claimed medical necessity to possess it. 532 U.S. at 494 n.7. Moreover, this case involves the manufacture and distribution of marijuana, as well as its possession.

Respondents' Fifth Amendment argument fares no better. There is no fundamental right to use marijuana for medicinal purposes in the face of Congress's placement of marijuana in Schedule I based on a determination that marijuana has "no currently accepted medical use for treatment in the United States" and has a high potential for abuse. 21 U.S.C. 812(b)(1)(A)-(C); cf. *United States* v. *Rutherford*, 442

U.S. 544 (1979). Congress has established procedures to remove drugs from Schedule I if they no longer satisfy the criteria for that schedule (21 U.S.C. 811), and has provided the FDA with authority to approve a drug product containing marijuana should it be shown to be safe and effective for any medical use (21 U.S.C. 355). Congress also permits individuals to participate in research projects that have been registered with the DEA and approved by the FDA. 21 U.S.C. 355(i), 823(f). Respondents do not assert that they have invoked any of those statutory mechanisms.[4]

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

NOVEMBER 2004

[4] In disagreeing with Congress's judgement that marijuana has no medical utility, respondents and their amici principally rely on the report of the Institute of Medicine (IOM) that reviewed the existing scientific evidence concerning possible medical uses of marijuana and recommended that further research be devoted, not to developing marijuana as a licensed drug, but to developing a method of delivering cannabinoids without the serious adverse health consequences associated with smoking marijuana. IOM, *Marijuana and Medicine: Assessing the Science Base* 10-11 (Janet E. Joy et al. eds. 1999) ("Because marijuana is a crude THC delivery system that also delivers harmful substances, smoked marijuana should generally not be recommended for medical use."). Similarly, although respondents point out that Marinol is a lawful drug that contains *THC* (Br. 4 n.4), respondents do not (and could not) dispute that *marijuana* is a Schedule I controlled drug that has never been approved for any medical use by the FDA. See U.S. Pet. 17 n.4; U.S. Br. 41-42 n.5.